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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID O'NEAL COLEMAN, Defendant and Appellant.	F070006 (Super. Ct. No. CRM028791) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Rachelle Newcomb, and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Detjen, J. and Poochigian, J.

David O'Neal Coleman (defendant) was convicted of 11 crimes, and several enhancements. He argues the judgment must be reversed because the trial court erroneously admitted his statement to police in violation of his Sixth Amendment right to counsel. He also argues the trial court miscalculated by one day the time credits to which he is entitled. Our review of the record identified a third issue, on which we asked the parties for additional briefing. This issue was the failure of the trial court to impose sentence on several of the counts.

We conclude defendant's statement to the police was properly admitted, and even if error occurred it was harmless. We will remand the matter to the trial court to correct the time credits to which defendant is entitled, and to sentence defendant on the convictions for which it failed to impose a sentence.

FACTUAL AND PROCEDURAL SUMMARY

I. The Information

Over a period of approximately nine months defendant was arrested numerous times and escaped from jail once. Because of defendant's extensive criminal history, most charges included several enhancements. The first amended information was filed after the trial court ordered the actions consolidated. The result was 15 separate charges. To ease the reader's task we summarize the charges and enhancements by date of the crime.

July 1, 2013

Defendant was charged with burglary in the first degree in violation of Penal Code section 459 (count 1).[1] The information charged the following enhancements and allegations: (1) a person other than an accomplice was present during the burglary within the meaning of section 667.5, subdivision (c)(21), (2) defendant had suffered a prior conviction that constituted a strike within the meaning of section 667, subdivision

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[1] All statutory references are to the Penal Code unless otherwise indicated.

(b) through (i) (hereafter a prior strike conviction), (3) defendant had suffered a prior conviction that constituted a serious felony within the meaning of section 667, subdivision (a)(1) (hereafter a prior serious felony conviction), and (4) defendant had served four prior terms in prison within the meaning of section 667.5, subdivision (b) (hereafter a prior prison term).

December 4, 2013

Defendant was charged with possession of a stolen motorcycle in violation of section 496d, subdivision (a) (count 2). The information alleged the crime was committed while defendant was on bail for another felony offense within the meaning of section 12022.1, subdivision (b) (hereafter an on-bail enhancement), a prior strike conviction, and four prior prison terms.

The second count charged defendant with possession of methamphetamine for sale in violation of Health and Safety Code section 11378 (count 3). This count included the same enhancements as the prior count.

The third count charged defendant with misdemeanor resisting arrest in violation of section 148, subdivision (a)(1) (count 4). No enhancements were charged in this count.

January 26, 2014

Defendant was charged with receiving a stolen trailer in violation of section 496d, subdivision (a) (count 5). This count was dismissed at the request of the prosecutor at the beginning of trial.

The second count charged defendant with receiving stolen property in violation of section 496, subdivision (a) (count 6). Both counts alleged an on-bail enhancement, a prior strike conviction, and four prior prison terms.

January 31, 2014

Defendant was charged with possession of a firearm by an individual who had been convicted of a felony in violation of section 29800, subdivision (a)(1) (count 7).

The information alleged an on-bail enhancement, a prior strike conviction, and four prior prison terms.

The second count charged defendant with possession of ammunition by an individual who had been convicted of a felony in violation of section 30305, subdivision (a)(1) (count 8). The information alleged the same enhancements as the prior count.

The third count charged defendant with misdemeanor resisting arrest in violation of section 148, subdivision (a)(1) (count 9). No enhancements were alleged for this charge.

February 6, 2014

Defendant was charged with possession of methamphetamine for sale in violation of Health and Safety Code section 11378 (count 10). The second count charged defendant with transportation of methamphetamine in violation of Health and Safety Code section 11379, subdivision (a) (count 11). Both counts alleged an on-bail enhancement, a prior strike conviction, and four prior prison terms.

March 1, 2014

Defendant was charged with possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a) (count 13). The information alleged an on-bail enhancement, a prior strike conviction, and four prior prison terms.

March 5, 2014

Defendant was charged with misdemeanor resisting arrest in violation of section 148, subdivision (a)(1) (count 12). No enhancements were alleged.

April 3, 2014

Defendant was charged with escape by force in violation of section 4532, subdivision (b)(2) (count 14). The information alleged a prior strike conviction, and four prior prison terms.

April 4, 2014

Defendant was charged with misdemeanor resisting arrest in violation of section 148, subdivision (a)(1) (count 15). No enhancements were alleged.

II. The Testimony

As above, to ease the reader's task we summarize the testimony by the relevant date of the offenses.

July 1, 2013

In the early afternoon on the date in question Cheryl Tramp was at home when she noticed a plumbing service van drive into her driveway. Tramp was not expecting anyone, so she went into a bedroom and did not answer the door. Tramp assumed the van left when the knocking on the front door stopped. When Tramp looked outside she noticed the van had moved to the side of the house. Tramp called her husband and confirmed that he had not called for service. Tramp heard noises behind the house, and then heard the alarm sound indicating a door had been opened. Tramp went into the bedroom and retrieved a shotgun. She racked the shotgun so the intruder would hear that she was armed, and told him to leave the house. Tramp saw defendant enter the hallway to her bedroom. Tramp pointed the shotgun at defendant and told him to leave. Defendant claimed he had forgot his wallet, and asserted Tramp had invited him in. However, he eventually exited through the front door and drove away. When the police arrived Tramp and her husband found damage to two doors.

Tramp had received plumbing services from defendant approximately four months before this incident. He had not been back to the residence since, and she had not found his wallet or heard that he had lost his wallet.

Defendant was arrested later that day; he had his wallet in his possession.

December 4, 2013

Sergeant Mike Trenholm of the California Highway Patrol was patrolling shortly after midnight on the date in question when he observed what appeared to be a disabled

pickup parked on the side of the road with two people nearby. A motorcycle was in the bed of the pickup. Trenholm stopped to render assistance. Defendant was one of the people near the pickup. The other individual stated the pickup had run out of gas, while defendant stated he owned the motorcycle. While Trenholm was checking to determine if any arrest warrant had been issued for either man, he observed defendant walk to the front of the vehicle and then return to sit on the tailgate. Trenholm did not have a clear view of defendant, so he could not tell if defendant threw something while at the front of the pickup.

Although there were no outstanding warrants issued for either individual, defendant's actions made Trenholm suspicious. A few moments later Trenholm was informed the motorcycle had been stolen approximately two weeks earlier. He requested assistance, and when the other officers arrived Trenholm attempted to arrest defendant for the stolen motorcycle. A fight ensued when defendant resisted arrest. Another officer used a Taser on defendant. Defendant was eventually restrained.

California Highway Patrol Officer Charles Wilson arrived at the scene as defendant was being placed in restraints. Wilson later located a small black camera case approximately 20 to 30 feet from the front of the pickup near a utility box. Inside the bag was a digital scale, small plastic baggies, a small baggie of what appeared to be marijuana, and two golf-ball sized baggies containing a substance that appeared to be methamphetamine.

The substance in the two golf-ball sized baggies was tested and determined to contain methamphetamine, and weighed 56.7 grams.

January 26, 2014

Merced Police Officer Edwin Arias was on duty on this date and responded to a residence where a trailer was located. Arias checked the computer database and determined the license plate was from a trailer that had been reported stolen. He could

not verify if the trailer was stolen because he could not find a vehicle identification number on the trailer.

Lisa Watland testified that her trailer was stolen from her house around June 15, 2013. She identified the license plate on the trailer located by Arias as coming from her trailer, but testified the trailer found by Arias was not her trailer.

In an interview with Merced Police Detective Reynaldo Alvarez, defendant claimed he bought the trailer and had a bill of sale for it.

January 31, 2014

Merced Police Detective Allen Adrian was part of a team serving a search warrant to search a residence attempting to locate defendant. The initial search of the residence did not locate defendant, however Adrian noticed insulation under the sheetrock covering the access hole to the attic. A search of the attic located several firearms as well as defendant who had been hiding under the insulation. Defendant would not come out of the attic willingly, and struggled with officers in an attempt to prevent arrest. Police officers made a hole in the sheetrock ceiling underneath defendant and eventually dragged him out.

Alvarez also participated in the search of the residence and garage on the day in question. Located in the master bedroom was a men's wallet with a temporary driver's license for defendant. Also found and seized during the search were (1) a box of ammunition, (2) a police scanner, (3) a box of sandwich baggies, (4) three laptop computers, (5) three cell phones, (6) a surveillance system with cameras covering each side of the house, and (7) numerous tools, with many duplicates. The parties stipulated that defendant had a prior felony conviction for the weapons charges.

February 6, 2014

Merced Police Sergeant Luis Solis was assigned to investigations on this date. On that afternoon he observed defendant driving a vehicle in town. Solis knew defendant's driver's license was suspended so he made a traffic stop. As defendant was pulling his

vehicle over to the side of the road, Solis saw an object fly out of the window. Defendant, who was the only occupant of the vehicle, was detained. Solis kept the object in view until officers arrived to provide support. Solis collected the item which appeared to be methamphetamine. Defendant was arrested. Solis observed a police scanner inside the vehicle defendant was driving. He confiscated a digital scale and $295. Also found inside the vehicle were (1) a knife, (2) women's jewelry, (3) jewelry boxes, (4) a glass pipe used for smoking methamphetamine, (5) another bindle of methamphetamine, and (6) a cell phone. Both packages of methamphetamine contained a usable amount of the drug. The cell phone contained text messages that appeared to be linked to the sale of methamphetamine. The larger package of suspected methamphetamine weighed 8.08 grams with the packaging, and the smaller package weighed .67 grams with the packaging. Both packages were subsequently tested. The larger package contained 7.396 grams of methamphetamine, and the smaller package contained .547 grams of methamphetamine.

March 1, 2014

Merced Police Officer John Pinnegar was on patrol on the night in question when he was dispatched to an apartment complex for a reported disturbance. He contacted Monica Pantoya, who Pinnegar knew to be dating defendant at the time. Pantoya claimed she did not know where defendant was, but Pinnegar saw him hiding in the shadows. Pinnegar knew there were outstanding warrants for defendant's arrest. Defendant ran to a motorcycle and drove away. Pinnegar pursued defendant with other officers. The motorcycle was found abandoned approximately five minutes later. A bag was found attached to the motorcycle. Inside the bag was a picture of defendant and Pantoya, some methamphetamine located inside a "false Coke can," and marijuana in a large sandwich bag. The bag of marijuana weighed approximately 14 ounces. Defendant escaped that night.

The substance found inside the can was tested and determined to be .042 grams of methamphetamine, a usable amount.

March 5, 2014

On this date Solis responded to a report of a possible burglary in progress. Solis parked a short distance from the reported area of the burglary and walked the area looking for suspicious activity. As he began his survey of the area, Solis observed defendant come out of a motel room wearing a wig. Solis knew there were outstanding warrants for the arrest of defendant so he pulled out his Taser and ordered defendant to the ground. Defendant ran, but Solis caught him and wrestled him to the ground. Defendant was taken into custody.

April 3-4, 2014

Correctional officer Tou Lee was on duty on the night of April 2, 2014, and continuing through to the morning of April 3, 2014. At approximately 5:00 a.m. during a routine inspection it was discovered that defendant was no longer in his dorm. Defendant had made a hole in the sheetrock ceiling above a bunk bed, and then made a hole in the roof to climb out.

The following day defendant was located in the crawl space underneath a residence. Defendant initially appeared to cooperate, but eventually attempted to escape through a second exit from the crawl space, where a deputy sheriff was waiting. Ultimately, he was detained after a struggle with three deputy sheriffs.

Defendant was interviewed after he was arrested for the escape. A recording of the interview was played for the jury.

In addition, a phone call made by defendant approximately one month after the escape was played for the jury. In this phone call defendant stated, "I mean yeah I did all those crimes, whatever, (unintelligible) they say, but I could beat a lot of 'em."

Expert Testimony

California Highway Patrol Officer David Anderson testified as an expert regarding narcotic sales. He testified that for long-term habitual users of methamphetamine the typical dose would range from one-eighth of a gram up to one-half of a gram. The nearly eight grams of methamphetamine recovered on February 6, 2014, was "more along the lines of somebody who is selling drugs." To support this opinion, Anderson noted the presence of a digital scale to weigh the drugs to be sold, the text messages received on the phone found in defendant's possession, the presence of a police scanner in defendant's vehicle and at his home, the presence of a knife in the vehicle in a readily accessible location, the presence of numerous items in the vehicle and at defendant's house that could have been traded for drugs, and the presence of surveillance cameras at defendant's house.

Defendant's possession of 56.7 grams of methamphetamine on December 4, 2013, was also indicative of drug sales. This opinion was supported by the presence of a digital scale and numerous baggies, which are used to package drugs.

The 56 grams of methamphetamine would be valued at $1,000 to $2,000.

III. Closing Arguments, Verdict, and Sentencing

Closing arguments for both parties focused on the elements of the crime and urged the jury to draw inferences pointing to guilt or innocence as would benefit the verdict being sought.

The jury returned a mixed verdict, which we categorize by date of offense: *July 1, 2013*—guilty of first degree burglary (count 1); *December 4, 2013*—not guilty of receiving a stolen motor vehicle (count 2), not guilty of possession of methamphetamine for sale (count 3), guilty of misdemeanor resisting arrest (count 4); *January 26, 2014*—not guilty of receiving stolen property (count 5); *January 31, 2014*—guilty of possession of a firearm by a felon (count 6), guilty of possession of ammunition by a felon (count 7), guilty of misdemeanor resisting arrest (count 8); *February 6, 2014*—guilty of possession

of methamphetamine for sale (count 9), guilty of transportation of methamphetamine (count 10); *March 1, 2014*—guilty of possession of methamphetamine (count 12); *March 5, 2014*—guilty of misdemeanor resisting arrest (count 11); *April 3, 2014*—guilty of escape by force (count 13); *April 4, 2014*—guilty of misdemeanor resisting arrest (count 14). The jury also found true the on-bail enhancements for each felony count with a guilty verdict (other than the burglary charge).

In a bifurcated proceeding, the trial court found each of the prison prior allegations true.

The trial court chose the burglary count (count 1) as the principal term and sentenced defendant to the upper term of six years, doubled that term for the strike prior, added five years for the prior serious felony conviction, and added one year each for the four prior prison term enhancements for a total term of 21 years. The sentence for the escape count (count 13) was imposed at the low term of two years, then doubled because of the strike prior. The sentences on the possession of a firearm by a felon (count 6), possession of ammunition by a felon (count 7), and transportation of methamphetamine (count 10), were each imposed at one-third the midterm sentence, which was doubled because of the strike prior. Two years were added for the on-bail enhancement. The sentence on each count was imposed consecutively. The total term imposed was 31 years and eight months.

DISCUSSION

Defendant makes two arguments, and in our review of the file we identified an additional issue. We begin with defendant's second argument. Defendant asserts the trial court erred because it awarded him 203 days of pretrial custody credits when he was entitled to 204 days. The Attorney General concedes the trial court erred. We accept the concession and award defendant one additional day of pretrial custody credit, and remand the matter to the trial court to prepare an amended abstract of judgment.

The issue we identified is the failure of the trial court to orally pronounce sentence on the possession of methamphetamine for sale count (count 9), the possession of methamphetamine count (count 12), and the four misdemeanor resisting arrest counts (counts 4, 8, 11, & 14).[2] We agree with the parties the trial court erred when it failed to sentence defendant on these counts. (*People v. Duff* (2010) 50 Cal.4th 787, 795-796.) We decline the Attorney General's invitation to sentence defendant on these counts, and remand the matter to the trial court to complete the sentencing of defendant.

We now turn to the contested issue in the case. Defendant was interviewed after he escaped from the jail. He argues the interview violated his Sixth Amendment right to counsel as set forth in *Massiah v. United States* (1964) 377 U.S. 201. "The Sixth Amendment forbids the state from deliberately eliciting incriminating statements from the defendant in the absence of counsel. [Citations.] This constitutional guarantee precludes the government from taking any action to prevent an individual from invoking the right to counsel in any postindictment confrontations between suspect and state. [Citation.] Such a 'knowing exploitation by the State of an opportunity to confront the accused without counsel' [citation] renders any incriminating statements inadmissible as evidence against the defendant at trial. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 991-992, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 419-421 & fn. 22.) To establish a Sixth Amendment violation, defendant must demonstrate the police took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459.)

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[2] We note the minute order indicates the trial court sentenced defendant to the low term of 32 months for the possession of methamphetamine count, and this sentence was imposed concurrently. However, the oral pronouncement of judgment is the sentence, and any difference in the minute order is deemed a clerical mistake. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.)

Defendant's interview was played for the jury and, as we shall see, contained incriminating statements. The charges related to the escape were charged in count 13 (escape) and count 14 (resisting arrest). At the time of the interview, charges had been filed on the first 12 counts in the information, but no charges had been filed in counts 13 and 14. This is significant because the right to counsel is case specific and does not attach until a prosecution is commenced. (*Rothgery v. Gillespie County* (2008) 554 U.S. 191, 198; *People v. Clair* (1992) 2 Cal.4th 629, 657.) Accordingly, the parties agree that no right to counsel had attached to the charges related to the escape, but it had attached to the remaining counts. The issue arises because during the interview, defendant made incriminating statements related to charges that had already been filed and on which he had been appointed counsel.

We begin with the interview, which began with deputy sheriff Dustin Witt advising defendant of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). After that initial advisement, the following occurred:

> "[Witt]: Okay. Um, I'm not here to talk to you about any other crimes or why you're in jail. I'm just here to talk to you about your escape, okay? Obviously, you're not supposed – you're supposed to be in jail right now.
>
> "[Defendant]: Yes sir.
>
> "Q: All right. So, let's talk about that real quick. Um, start from the beginning.
>
> "A: Well, why I did it, is that what you're talking about?
>
> "Q: Yeah. Why and how? And how – how we ended up here.
>
> "A: Okay. Look, before we get in to that conversation, are you – are you recording?
>
> "Q: Is this – is this yours – from the – from the roof – I mean, from the razor?
>
> "A: Yeah.

"Q: Yeah, okay, go ahead.

"A: Uh, are you recording?

"Q: Yes I am.

"A: Okay, thank you. Um, uh, okay. [¶] . . . [¶][3]

"[Defendant]: Um, before we get started with this interview, because I know I'm being recorded. I'm a man, you're a man.

"[Witt]: Yes.

"A: I'll be straight forward with you, you be straight forward with me.

"Q: Yes.

"A: Don't play me for a lame and you don't play me for a lame.

"Q: One hundred percent – 100%.

"A: Thank you very much.

"Q: Okay.

"A: You guys got me. You did your job. Uh, hopefully no hard feelings, right?

"Q: No, this is strictly business.

"A: Thank you. [Redacted] [¶] Um, oh, fuck man. Anyways, I finally divorced my wife, I moved out 'cause my daughter wanted to move with me and that was great, man. Uh, I started struggling man. I had to make her fucking house payments, uh, she was being a bitch about everything, and I still wanted to make my kids happy, uh, 'cause my kids wanted to be with me, bro, for the first time in their life.

"Q: Right.

"A: And they're old – older, you know what I mean? So . . . I started struggling. Uh, I started selling dope for the first time in my whole fucking life. Really, you know what I mean? Um.

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3 There were times when the interview was interrupted by a third person, we omit those interruptions from the transcription of the interview.

"Q: We'll get you some water in a second.

"A: Um, I caught a case. . .

"Q: As soon as we're done with this.

"A: . . . I caught a case, uh, on both cases, I went to jail. I had my money from my fuckin books in my pocket, I spent the night out at Sandy Mush. [Redacted] I spent the night at Sandy Mush and this kid tells me, 'Well, you got money, why don't you bail?' I was like, 'Hey, I can fucking bail out. Let's try this bud.['] So I bailed out. Uh, caught another dope case. Fuck, I can bail out, right? I bailed right out. Caught another dope case.

"Q: The revolving door.

"A: Exactly, four times, uh, I was going to bail right out. Uh, all said and done.

"Q: How 'bout this last time that you ended up in there?

"A: What do you mean?

"Q: This – why you're in there now – how – how did that end up?

"A: Well.

"Q: Well I – I know, not the whole – I know going on the run and all that stuff, but how – what are your char– you got in for a variety of charges, right?

"A: Yeah, 'cause they all started stacking on me.

"Q: Oh okay,'cause you kept FTAing?

"A: No, I actually – one time actually.

"Q: Okay.

"A: Uh, they raided my house, they found a bunch of stuff at my house, uh, I got out the next day – six grand. Whoever raided my house, it pissed me off. It really did, because I wasn't even out 24 hours, they pulled me over for bogus charges and arrested me, again.

"Q: Right.

"A: The cops that fucking arrested me, he fucked up on the paperwork down at the County Jail, I got to bail out again for 500 bucks.

"Q: Oh, no kidding?

"A: They didn't like that. At Midnight that n– at Midnight, the s– the judge issued a fucking $200,000 warrant for my arrest. Bro, I've been bailed out of jail five times now, I'm broke. So, then, I got court in ten days.

"Q: Is this what got you back in jail?

"A: Yeah, this is (unintelligible).

"Q: So this – now we're fast forward to just recently?

"A: So this is what happened, so I'm thinking well, if I go to jail, which I didn't miss any of my court dates, um, I'm fighting it – I think I can beat this case.

"Q: Mm-hm.

"A: Uh, I'm going to get arrested.

"Q: Mm-hm.

"A: I can't – I can't afford $20,000. Well, I didn't go to court. Fuck it. Judge issued another bench warrant, blah, blah, blah. I thought, well, you know, if they catch me – they catch me. Uh, and then you guys caught me and I went to jail. So now the Judge is like, these little case[s] I got, fail to appear[], you know, the burglary, I could beat. . . .

"Q: Your bail's huge.

"A: Half a million dollars, man.

"Q: Yeah, so.

"A: So. [¶] . . . [¶]

"Q: So you – you're at the jail, and you obviously went through the roof.

"A: I did.

"Q: And over the fence. You got cut up pretty bad, huh?

"A: I – I got cut up on the roof.

"Q: On the roof, not on the razor wire?

"A: Yeah, on the roof, actually.

"Q: Okay.

"A: 'Cause I was going over the roof towards the chow hall.

"Q: Uh-huh, okay.

"A: Uh, and I slipped and fell.

"Q: Ooh.

"A: And I h– was hanging off the fucking wall in the wire, and I'm laying there thinking. . .

"Q: What the fuck.

"A: 'This is it, bro. This is fucking it. Was it worth that? To bust a hole in the ceiling and now I'm laying up in this razor wire? Come on. Fuck no, it wasn't.' But, yeah, I managed to get back up on the roof and shit, I was like, 'Fuck it. I'm here, man. Let's try it.'

"Q: So you made it out?

"A: Mm.

"Q: You bedded. . .

"A: (Unintelligible).

"Q: . . . you bedded down in the field a little bit.

"A: Um, actually no.

"Q: No?

"A: I kept on going, 'cause. . .

"Q: Which way did you head?

"A: . . . the first time I fucking escaped Sandy Mush, I had a ride that time.

"Q: You didn't have a ride this time?

"A: No, I didn't. Uh, and by the time I got down to 59, it was fucking daylight, bud.

"Q: Today? This time?

"A: No, the last time.

"Q: Oh.

"A: This time, it wasn't happening. I was butt naked. I had a pair of boxers on and one tennis shoe.

"Q: Okay.

"A: I can't go far. And everything's soaked in blood.

"Q: So, um, which way did you head?

"A: I just kept on a walking. Uh, I cut right through the cow pasture.

"Q: But towards, uh, 59 – Sandy Mush or back towards Merced?

"A: Uh, there was a creek, I guess, that runs along back Sandy Mush out back there. There's a tree line or whatever that is.

"Q: That takes you to Merced?

"A: Exactly.

"Q: So you headed away from the jail, that way back towards Merced? North, it would be?

"A: Yeah, yeah.

"Q: How long did it take you to get in to town?

"A: Well, I got back in to town way before daylight.

"Q: Did you steal a car?

"A: I never stole a car in my life, bro.

"Q: Okay.

"A: Ever.

"Q: Um, where'd you go?

"A: I went to Shannon's grocery store.

"Q: Like that?

"A: Well, what am I going to do?

"Q: What'd you do there?

"A: What the fuck am I going to do? I made a collect call.

"Q: And nobody was there yet?

"A: Where?

"Q: It wasn't daylight yet?

"A: No sir.

"Q: So it was a little. . .

"A: Almost dusk.

"Q: Nobody was. . .

"A: It was dusk.

"Q: . . . nobody was around?

"A: Mm-mm. I didn't see nobody. Uh, actually there was – there was two people across the street at the UPS that caught a little glimpse of me and was like, 'Oh fuck, man. There it is.' But, uh, I called a couple people collect and no one answered, and. . .

"Q: So what'd you do?

"A: . . . at that moment they didn't, you know?

"Q: You eventually got a ride? Or did you – how long – I – I guess my question is to you, how long did you stay at Sandy Mush or I mean how long did you stay at Shannon's or did you keep on moving?

"A: I don't know. I only called like two or three times.

"Q: And then what'd you do?

"A: I'm a convict bro, I'm not telling on nobody, though.

"Q: I'm not, uh, here's the deal, I'm not asking you to tell on anybody. You can leave that part out if you want.

"A: Yeah.

"Q: I just want to know your – your travels.

"A: Thank you.

"Q: You can say, 'I got a ride,' you don't have to say the person.

"A: Uh, you know, I did get a ride at the beginning.

"Q: So. [¶] . . . [¶]

"A: It was well after that before I got picked up. [¶] . . . [¶]

"Q: So then you – did you come straight out here? I mean, where we got you at?

"A: Uh, no I went, uh, behind Shannon's, there's a house there. I went through their yard and jumped their fence. There's a field there. There's some newer houses back towards that way towards Child's. Oh man.

"Q: Where were you at when it was daylight?

"A: Out.

"Q: Just hanging out?

"A: I wasn't hanging out[.] I was (unintelligible) I was looking for some clothes is what I was doing. And do you know where I got my clothes at?

"Q: Where?

"A: It was at the Reef's apartment, is that what it's called?

"Q: The what?

"A: Is it Reef's or something like that?

"Q: Uh-huh.

"A: Right there, bud.

"Q: You stole 'em?

"A: (Unintelligible). [¶] . . . [¶]

"Q: . . . So, you – after that?

"A: I got a ride after that, bud.

"Q: You've been there ever since?

"A: Where's that?

"Q: Where we arrested you at?

"A: Uh, at first, no. I wasn't there yesterday when you guys came.

"Q: Yes, you were.

"A: Come on, buddy.

"Q: I know you were.

"A: I wasn't there.

"Q: I know you were, dude.

"A: I was right before that, though.

"Q: Remember, man to man?

"A: Yeah, I understand that.

"Q: Okay.

"A: And I would never disrespect you.

"Q: Okay.

"A: 'Cause you did say that, man to man.

"Q: Okay, okay.

"A: Uh, when you guys rolled up, I wasn't there.

"Q: Where were you?

"A: I just got there, though.

"Q: When? Did you pass us coming in or something?

"A: I wasn't in no vehicle or nothing.

"Q: You were on foot?

"A: I got a – I got a call.

"Q: You got a call saying we're on our way?

"A: Bro, I got a call saying that, uh. . .

"Q: From Sergio?

"A: From who?

"Q: Sergio?

"A: Oh, no, no. Sergio had no idea I was out there. He did not have no fucking – not a clue.

"Q: So you got a call. What'd the call say?

"A: And hold on a second. I've known that man my whole fucking life.

"Q: Okay.

"A: Um, I really have.

"Q: Okay. Well we're leaving him out of this.

"A: Um, uh.

"Q: What'd the caller say?

"A: Hoo, man. Well, what the caller said is like, 'Probation's coming. They just passed me.' Um, you guys like probably five people there, though, wherever this is, coming. . .

"Q: So, did you hit the field or something?

"A: . . . like twenty stories right there in Planada and I didn't know you guys were coming there. I knew probation was looking for me. But, uh, yeah, I bailed.

"Q: Where'd you go?

"A: I bailed. Well, actually I didn't hit the field in the back of the house, I fucking hit the, uh, the sailboat.

"Q: You were hiding in the sailboat?

"A: Yeah.

"Q: And just underneath it – or under the. . .

"A: In it.

"Q: . . . just in it? Did you see the dog and shit?

"A: What dog?

"Q: You didn't see a dog running around there or nothing? And then what did you do when we came out?

"A: Came out where?

"Q: I mean, once – once we left, what'd you do?

"A: (Unintelligible), uh.

"Q: Went back in the house?

"A: Yeah, I fucking hid in it. You know why I went back in the house?

"Q: You're – huh? You're like we missed ya once.

"A: No, I went back in the house and was like, you know what, I'm not a fucking mass murderer, they done kicked in all these motel doors since 8:00 o'clock this morning, I don't think they'll come back here. I mean, what made you even think I'd go there. What gave you the clue? I never called anybody out there. Did I really?

"Q: Right, I'm just sh– agreeing with you as far as. . .

"A: I mean, I know how many houses you hit because you went to my phone call log and I – I understand that. Uh, but I never c– called anybody from out there.

"Q: So, when we came back today, you didn't have time to run, huh?

"A: Yeah.

"Q: You didn't get a phone call that time, right? So you went under the house? And why did you not come out, like you said? [¶] . . . [¶]

"A: Well, let me say this one more time. Uh, I have kids out there I love dearly, man.

"Q: But we already had you.

"A: I understand that. And look at me. You beat the fuck out of me. But you know what, it was worth it to me. If I had one more chance to get away.

"Q: If you could've slipped just by us a little bit.

"A: One more time, because you know what, I wasn't armed. Fuck a taser, it hurts for a minute. Fuck the punches in the face, I'll heal. I didn't think you guys were gonna shoot me, I really didn't. (Unintelligible).

"Q: Okay.

"A: Thank you.

"Q: Well, we thank you for your cooperation.

"A: Well, I thank you. No dis– disrespect. I hope not."

Defendant begins by asserting he confessed to each of the pending charges in this interview, but his argument focuses on the possession for sale count and the transportation count. He suggests the jury used his guilt on these counts to find him guilty of the burglary count. He argues these statements violated his Sixth Amendment right to counsel and each should have been excluded.

We disagree. First, we conclude defendant's constitutional rights were not violated. Second, even if a constitutional right was violated, defendant did not suffer any prejudice.

The questioning about defendant's escape did not violate his right to counsel. No charges had been filed, so his Sixth Amendment right to counsel had not attached. Moreover, he impliedly waived his Fifth Amendment right to remain silent by answering

questions.[4] The issue, therefore, is whether the questions posed to defendant sought information about his escape, or instead were intended to elicit information about the crimes with which he had already been charged.

A fair reading of the interview leads to the conclusion that defendant was not questioned about the charges that had already been filed, but was only questioned about the escape. It is true that defendant made incriminating statements about the already charged crimes, but those statements were volunteered and not in response to a question asked by Witt.

After advising defendant of his *Miranda* rights, Witt began the interview by clearly informing defendant of the limited scope of the interview, specifically that he was "not here to talk to you about any other crimes or why you're in jail. I'm just here to talk to you about your escape, okay? Obviously, you're not supposed – you're supposed to be in jail right now." Defendant acknowledged he was supposed to be in jail, and Witt responded, "[L]et's talk about that real quick. Um, start from the beginning." Defendant asked if Witt was asking "why I did it" and Witt responded, "Yeah. Why and how? And how – how we ended up here." While undoubtedly Witt could have been more specific and responded to defendant's question by stating that he was asking why defendant escaped and how he ended up in what was apparently the hospital, considering the very specific restriction given by Witt at the beginning of the interview, the parameters of the question are clear to us and should have been clear to defendant. Defendant's subsequent statements about the crimes already charged were thus unsolicited. Accordingly, defendant's Sixth Amendment right to counsel was not violated.

Defendant's reliance on *Edwards v. Arizona* (1981) 451 U.S. 477, 480, 484-485 is misplaced. "Under *Miranda*[] . . . , any suspect subject to custodial interrogation has the

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[4] Defendant does not assert he did not waive his *Miranda* rights and the circumstances of this case do not indicate otherwise. (See *North Carolina v. Butler* (1979) 441 U.S. 369, 375-376 [explicit statement of waiver not necessary].)

right to have a lawyer present if he so requests, and to be advised of that right. [Citation.] Under *Edwards*[] . . . , once such a defendant 'has invoked his right to have counsel present,' interrogation must stop. [Citation.]" (*Montejo v. Louisiana* (2009) 556 U.S. 778, 794 (*Montejo*).) Defendant argues that he had been arraigned on other charges prior to his escape and subsequent custodial interrogation. He asserts that, since he had requested counsel at those arraignments and counsel had been appointed to represent him, the *Edwards* preclusion of further police contact applied to him. He is mistaken.

Defendant's position is consistent with the holding in *Michigan v. Jackson* (1986) 475 U.S. 625 (*Jackson*). The rule in *Jackson* forbade police from initiating interrogation of a criminal defendant once he had requested counsel at an arraignment or similar proceeding. (*Id*. at p. 636; accord, *Montejo*, *supra*, 556 U.S. at pp. 780-781.) The *Edwards* rule was "established to protect the Fifth Amendment-based *Miranda* right to have counsel present at any custodial interrogation." (*Montejo*, *supra*, at p. 787.) *Jackson* created a presumption by analogy to the *Edwards* rule that a waiver of rights under *Miranda* should be considered invalid if defendant previously requested counsel at an arraignment. (*Montejo*, *supra*, at p. 787.)

Montejo, however, overruled *Jackson*. (*Montejo*, *supra*, 556 U.S. at p. 797.) The United States Supreme Court rejected the position that once a defendant is represented by counsel, police may not initiate further interrogation. (*Id.* at pp. 786, 789, 792, 797.) A defendant may waive the right to counsel whether or not he is already represented by counsel. (*Id*. at p. 786.) That occurs when, as happened here, defendant is read his *Miranda* rights and agrees to waive those rights. (*Montejo*, *supra*, at p. 786.)

Nor do we agree with defendant's assertion that his waiver of his Sixth Amendment right was somehow involuntary because of police misconduct. (See, e.g., *Colorado v. Connelly* (1986) 479 U.S. 157, 163-164 [confession obtained in violation of a defendant's right to due process of law only if coercive police conduct was causally related to the confession].) There was no element of police coercion in this case. The

injuries defendant sustained in escaping and in resisting arrest were not the result of police misconduct, but were, as defendant admitted, necessary to affect the arrest. Moreover, there is no evidence defendant's injuries interfered with his ability to make a free choice to confess to various crimes. Indeed, defendant seemed to minimize his injuries during the interview. There is simply no evidence of coercion nor any evidence defendant's mental status was compromised.

Even if we assume defendant's right to counsel was violated, he did not suffer any prejudice, i.e., the evidence establishes the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant admitted "selling dope" in this interview, which the jury likely understood as an admission that defendant was selling methamphetamine. Defendant asserts this admission was significant because if it had not been admitted into evidence the jury would have concluded he possessed the methamphetamine for personal use.

There was evidence, to be sure, that defendant used methamphetamine. However, in counts 9 and 10 defendant was observed to throw a package out of the window of the vehicle he was driving. This object contained 7.396 grams of methamphetamine. Another package was found in the vehicle that contained .547 grams of methamphetamine, for a total of almost eight grams of methamphetamine. Expert testimony established the typical dose for the average user of methamphetamine varied from between one-eighth of a gram to one-half of a gram. The methamphetamine in defendant's possession thus was enough to constitute between 16 and 64 doses. This expert witness also testified that eight grams of methamphetamine generally indicated someone who was selling methamphetamine, not someone who had the drug for personal use.

The expert's opinion was further supported by the other items found in defendant's vehicle which included a police scanner, digital scale, cash, a knife, and a cell phone. The police scanner was used by dealers to avoid police officers. The digital

scale was used to measure the amount of methamphetamine being sold, and the cash was used to buy methamphetamine. The knife was used to protect the methamphetamine from being stolen. Also found in the vehicle were women's jewelry and jewelry boxes, which were commonly traded for methamphetamine. Finally, the cell phone recovered from defendant contained several text messages consistent with drug transactions. While defense counsel argued there was an innocent explanation for these items, a reasonable and logical inference to be drawn from these facts was that defendant was selling the methamphetamine.

We also reject the suggestion that the jury found defendant guilty on the burglary charge because of the prejudice caused by defendant's statement. The evidence of the burglary was overwhelming. Defendant broke into a home where he was confronted by the homeowner, who positively identified him because he had been at the house before to perform plumbing work. The only issue was defendant's intent when he broke into the house. Defendant told the homeowner that he had returned to retrieve his wallet. However, when he was arrested later that day he was in possession of his wallet. The jury would not have reached a different conclusion had these statements been excluded.

Nor do we believe defendant's comment was as significant as defendant suggests. We note that defendant was charged with two counts of possession of methamphetamine for sale. The first count occurred on December 4, 2013, when defendant was found in a vehicle that had apparently run out of gas. He was observed walking to the front of the vehicle after the police arrived. After he was arrested police officers found a package containing methamphetamine and a digital scale approximately 20 to 30 feet in front of the vehicle. The jury found defendant not guilty of this count. If defendant's admission in the interview was as prejudicial as suggested by defendant, logically the jury would have also found him guilty on this count. The jury did not.

Finally, the statements defendant argues should have been excluded are not the only evidence of an admission. Defendant made a telephone call from jail to a woman,

presumably his girlfriend. The call was recorded and played for the jury. In this conversation defendant was discussing the charges against him when he made the following statement, "But, um, as of right now, um, I don't think there's a whole lot that – that they could – I mean yeah I did all those crimes, whatever, (unintelligible) they say, but I could beat a lot of 'em."

Because of the overwhelming evidence of defendant's guilt, we conclude beyond a reasonable doubt that had the evidence been excluded the jury would have returned the same verdict. Moreover, not only is defendant unable to establish he was prejudiced by the introduction of these statements, but the trial court did not err in concluding the statements were admissible. Accordingly, there is no merit to defendant's argument.

DISPOSITION

The convictions are affirmed. The matter is remanded to the trial court to impose sentence for each count of which defendant was convicted. A new abstract of judgment is to be prepared and forwarded to the Department of Corrections and Rehabilitation. This abstract should reflect the additional day of custody credits to which defendant is entitled.